



CITY OF DURHAM
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MEMORANDUM

To: Mayor and City Council
From: Patrick W. Baker, City Manager
Date: May 11, 2007
Re: Duke Lacrosse Report

Attached for your review is a copy of a report prepared at my request by Durham Police Chief Steven W. Chalmers in the Duke Lacrosse matter (State v. David Evans, Reade Seligmann and Collin Finnerty). I have had the opportunity to review the report and discuss the same with various members of the Police Department.

At the outset, let me acknowledge the City's concurrence with Attorney General Roy Cooper's decision to dismiss all of the charges against Evans, Seligman and Finnerty as well as his declaration that these young men are innocent of the charges for which they were indicted. While the criminal proceedings against them have ended, a true and measured analysis and critique of their tortured path to justice is just beginning.

The ultimate question that will be the legacy of this matter is why it took the criminal justice system nearly thirteen months to reach the conclusion that the allegations of rape, sexual assault and kidnapping were unfounded. To answer this question, it is critical to review the

specific roles and actions of the individuals involved in this matter, including but not necessarily limited to the complaining witness, individuals at the party, prosecutors, criminal defense attorneys, the Durham Police Department and other investigators and individuals involved in the case. As it relates to the Durham Police Department, I requested Chief Chalmers to focus his review in three very specific areas: 1) define the roles and responsibilities of the Durham Police Department vis-à-vis the Durham District Attorney in this investigation; 2) address concerns related to the April 4, 2006 photo identification process and 3) describe our investigative efforts to uncover exculpatory evidence in this matter.

As it relates to the allegation that the Durham Police Department ceded the entire investigation of this matter to the Durham District Attorney, the report adequately addresses the role the Durham Police Department played in this investigation. The police are a part of the prosecution team and as such it is not unusual for the investigators to work closely and coordinate their investigation with the prosecutor who is ultimately tasked with advancing (or choosing not to advance) a prosecution. In this case, the Durham Police Department worked directly with both the Durham District Attorney and the Office of the Attorney General and coordinated their efforts with each of the relevant prosecutors. In both instances the role of the investigator was to assist the prosecutor in investigating and developing the case. This is a typical relationship between the police and the prosecutor.

I do want to take this opportunity to specifically address the considerable confusion in the media regarding my position on the April 4 photo process. Let me state as clearly as I can that the process by which the former defendants were identified as suspects by the complaining witness was neither conducted nor intended to be conducted in accordance with our recently adopted procedures on eyewitness suspect identification (General Order 4077). Furthermore, I would

concur with the Attorney General that “the process by which the accusing witness ultimately identified David Evans, Reade Seligmann and Collin Finnerty as her attackers was of questionable validity.” As stated in the report, it was the primary intent of the investigator at the time the photographs were shown to the witness to have her identify which of the individuals she recalls being at the party rather than to identify her alleged attackers. This decision to attempt to identify witnesses rather than suspects was driven primarily by the fact that the witness had failed to identify her attackers in six previous suspect identification processes which were governed by G.O. 4077. For the stated purpose of obtaining her recollection of the individuals at the party who could be of assistance in the investigation, this process was well suited to achieve that goal. The process however was not well suited for suspect identification primarily due to the fact that it was not conducted with the safeguards provided for in the policy. The identification of her alleged attackers in a process not designed or intended to produce such a result created a significant evidentiary quandary for the prosecutor. Regardless of the intent or expectations of the investigator, the resulting April 4 suspect identifications were procured through a process that would significantly reduce the likelihood that they could have survived the defense motions to suppress their admission into evidence at trial. This issue is magnified substantially given the fact that these photo identifications appear to be the strongest incriminating evidence against these young men. It is not lost on the Police Department that regardless of our intentions, the April 4 photo process created the opportunity for the false allegations to be specifically linked to Evans, Seligmann and Finnerty and further played a critical role in the decision by the Durham District Attorney to seek and ultimately obtain indictments of these individuals. Given the ultimate use of the results of showing the witness those pictures on that day, we regret the inadvertent creation of the opportunity to perpetuate false charges against these individuals. Nevertheless, I do not

concur with the assertion that the investigators went into the April 4 photo process with the intention, either on their own initiative or at the direction of the District Attorney, to violate G.O. 4077 by inducing the witness to identify her alleged attackers through a less reliable process.

Finally, I need to state that I am deeply troubled by the repeated allegations that the Durham Police Department investigators were not interested in discovering the truth in the matter or as the Raleigh News and Observer put it, “did not pursue basic evidentiary trails to learn what happened at the lacrosse party.” The investigative file is replete with numerous attempts by our investigators to contact witnesses and their attorneys seeking exculpatory statements and evidence. Aside from the initial meeting with the team captains (including David Evans) there was little if any exchange of the critical exculpatory information and evidence with the Durham Police Department that could have aided in bringing this matter to its rightful conclusion in the early stages of the investigation. One of the examples cited as evidence of our alleged indifference to the truth is the fact that our investigators never subpoenaed photographs apparently in the possession of Kevin Coleman. This assertion ignores the fact that our investigators made repeated requests of numerous attorneys to obtain copies of those photographs to no avail. Furthermore, these photographs along with a video recording and all of the remaining exculpatory evidence the Attorney General found to be so compelling in favor of dismissal were ultimately provided to the special prosecutors by the defense team without the need for a subpoena. In attempting to answer what I believe to be the penultimate question as to why justice took nearly thirteen months to arrive on the scene in this case, I would submit the answer rests primarily in the contrasting relationship between the defense team and the two prosecuting agencies in this matter. The working relationship between the Durham District Attorney’s office and the defense team during the first 10 months of this case was not conducive

to an efficient and thorough review of the facts of this case. While I have seen media accounts suggesting that defense counsel made numerous attempts to present the District Attorney with their exculpatory evidence, no such attempt was made by defense counsel to present this information to the Durham Police Department despite numerous requests and opportunities to do so. As such, the opportunities for a free flowing exchange of vital information and evidence that may have established earlier on in the process that the allegations were unfounded were missed. This is particularly important given the dramatic change in the working relationship between the defense team and the Office of the Attorney General once the case was transferred in January. Shortly after the transfer, critical witnesses and exculpatory evidence were voluntarily made available to the prosecution by the defense team for questioning and review which directly led to a swift follow-up investigation and determination to dismiss all remaining charges against the players.

In conclusion, while there are literally hundreds of decisions that went into the prosecution and ultimate dismissal of these charges, the level of cooperation and collaboration between the prosecution and the defense to get to the truth of the matter served as the primary driving force in both the delay and ultimate achievement of justice in this matter. I will await further instructions from Council if you have additional questions or concerns that you would like for the administration to address in this matter.



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To: Patrick W. Baker, City Manager

From: Steven W. Chalmers, Chief of Police

Date: May 11, 2007

RE: Police Department Report on Duke Lacrosse Investigation

Pursuant to your request, the following is a report of specific actions of the Durham Police Department with regards to the investigation of an alleged attack occurring March 14, 2006 at 610 N. Buchanan Boulevard. This report describes the basic role of the police in the initiation and investigation of a felony case, details the presentation of photographs to Crystal Mangum in the investigation of her allegations of sexual assault, and addresses allegations that investigators, in the aforementioned matter, failed to follow leads to uncover evidence which tended to demonstrate the innocence of the accused.

I. General Role of Law Enforcement in a Felony Case

Felony charges and arrests may be initiated in several ways. One option is for an officer, with probable cause that a crime has been committed and that a particular individual committed it, to make a warrantless arrest of the individual in a public place. The officer must then take the arrested individual before a judicial official, typically a magistrate, who makes a determination as to whether the officer had probable cause to arrest the individual. If probable cause is found, the magistrate issues a magistrate's order which charges the individual with one or more crimes. The magistrate will also set any conditions of pretrial release.

A second option is for an officer with probable cause that a crime has been committed and that a particular individual committed it, to apply for an arrest warrant from a judicial official, again typically a magistrate. The arrest warrant charges a criminal offense and orders an officer to take the named person into custody. Once the person is arrested, the officer must take the arrestee before a judicial official, usually a magistrate. The magistrate will then determine any conditions of pretrial release.

In each of the above situations, the next step is usually the first appearance in district court. The district court judge will determine if the defendant has or wishes to have an attorney, and will normally schedule a probable cause hearing. If a prosecutor obtains an indictment before the scheduled probable cause hearing, no hearing is held. At the probable cause hearing, the state must present enough evidence to convince the district court judge that there is probable cause to believe that the defendant committed the charged felony or a lesser offense. If the judge finds

probable cause exists for a felony prosecution, then the prosecutor will submit a bill of indictment to the grand jury.

A final option is for a felony to begin directly with the prosecutor submitting a bill of indictment to the grand jury. This is how charges were initiated in the Duke lacrosse case.

Once a matter is to be brought before the grand jury, officers are ordered by the District Attorney's Office, either by written subpoena or oral, that they are to appear before the grand jury on a particular date and time. Officers who fail to appear on scheduled court dates are subject to action by the court as well as department discipline. At the grand jury proceeding, the officer's role is to present the evidence that he or she has at that time. The grand jury's role is to determine, based upon the evidence presented, whether there is probable cause to indict the defendant. An indictment is simply a charge which must then be proved at trial. Probable cause to indict is a much lower standard than the proof beyond a reasonable doubt which is required to find a defendant guilty of a criminal offense. If the grand jury finds probable cause, as was the case with Finnerty, Evans and Seligmann, the grand jury will issue "true bills". If no probable cause is found, "no bills" are issued. A defendant is then taken into custody if not previously arrested on the matter and presented to a judicial official who will set any conditions of pretrial release.

Typically, an assistant district attorney will be assigned a particular case. However, on occasion, the District Attorney may assume responsibility for the prosecution of more serious, high-profile cases. Whichever occurs, the police department investigator will usually work closely with the attorney especially with regards to more serious offenses. The officers are expected to keep the attorney apprised of developments in the case. Ultimately, the prosecutor must assess the strength or weakness of the case in order to determine whether to proceed to trial, to accept some type of plea agreement, or to dismiss the matter altogether. Therefore, it is not uncommon for the attorney to suggest additional or different investigative methods that he or she feels might be useful to their prosecution of the case. During the investigation of Mangum's alleged sexual attacks, the investigators initiated numerous investigative methods and independently pursued leads. However, as is expected, they regularly updated the District Attorney on their actions and sought to act upon any further suggestions from the District Attorney.

According to police department investigators, in past cases, the District Attorney's investigators have served more perfunctory roles, such as scheduling witnesses and serving subpoenas, contrary to the role assumed by District Attorney investigator Linwood Wilson in the investigation of Mangum's allegations. Nonetheless, when such a situation arises, it would not be unusual for an officer to work with this or any representative of the District Attorney's Office in what we have always viewed as a collaborative effort. Therefore, when Wilson would contact an investigator indicating that he had information that he wished to investigate further, the officer would typically accompany Wilson. However, investigators initiated and independently pursued other investigative techniques. Their efforts to work collaboratively with the District Attorney's Office in no way indicated or resulted in a relinquishment of their responsibilities in the investigative process.

II. Photo Arrays and Presentations

By the afternoon of March 16, 2006, investigators had received information that the house in which the alleged attack had occurred was rented by members of the Duke University lacrosse team; that the party during which the incident is alleged to have occurred was attended by some such members; and Crystal Mangum had alleged to the police that the names of her attackers were “Brett”, “Adam” and “Matt.” An investigator with the Durham Police Department obtained a CD from the Duke University Police Department containing Duke University lacrosse team member photographs with corresponding names. There was only one lacrosse team member with the name of “Brett,” one team member with the similar sounding name of “Breck,” and one team member with the name of “Adam.” Three lacrosse team members had the name of “Matt.” Therefore, at this point in time, investigators focused upon the individual named “Matt” who was an actual tenant of the home in which the alleged attack occurred believing that it was most logical that particular “Matt” would have been present at the residence during the party.

Consequently, four photo arrays were shown to Mangum in the hopes that she would be able to identify her alleged attackers. Each array contained a photo of one of the individuals considered a potential suspect in the arrays so that: one array contained a photo of “Brett;” one array contained a photo of “Breck;” one array contained a photo of “Adam;” and one array contained a photo of the particular “Matt” described above. Consistent with Durham Police Department General Order 4077 Eyewitness Identification:

- Mangum was not shown the photo arrays in the presence of any other potential witnesses;
- The photo arrays were presented to Mangum by an independent administrator i.e. an officer who did not know which person in each of the photo arrays was considered the suspect in the array;
- Five fillers were used per suspect photo. Photos of Duke University lacrosse team members identified as persons other than “Brett,” “Breck,” “Adam” or the “Matt” described above were selected;
- The fillers selected resembled the suspect in each of the arrays in significant features such as race, gender, facial features and weight. In addition, using other team photos so that persons in the entire array were similarly dressed, as opposed to, for example, attempting to obtain other college lacrosse team photographs, could help to ensure that suspicion was not improperly focused upon the suspect photo who appeared dressed in dark blue, a color which might be associated with Duke University;
- Different fillers were used in each of the four arrays;
- Photographs were presented sequentially;
- Mangum was given standard verbal instructions for each array which included advising her that the photograph of the person who committed the crime may or may not be included in the particular array.

Mangum did not identify her alleged attackers from the arrays presented to her that day.

On March 16, 2006, subsequent to the four photo arrays described above, investigators spoke with Dave Evans and Dan Flannery pursuant to their execution of a search warrant at 610 Buchanan Boulevard. While speaking to the investigators, one of the men indicated that he could not recall certain details of the night in question, but within a short period of time provided a written statement which included such details. While investigators found the men during the night of March 16th to be generally cooperative, issues such as the aforementioned matter caused the investigators to question whether the men were being completely forthcoming.

By March 21, 2006, investigators had been unable to determine with certainty which persons were actually at the residence the night of the alleged attack. However, they had been able to establish that the two tenants of the home with whom they had spoken on the 16th, Dave Evans and Dan Flannery, had been at the residence the night of the party and that they were the individuals who had made arrangements for the party including hiring and paying for the dancers. By this point, investigators were becoming suspicious as to the accuracy of the names provided by the complaining witness. Officers knew that Dan Flannery had used a false name when hiring the dancers. In addition, records indicated that Magnum had previously alleged that Dan Flanagan ("Flanagan" being the false name provided by Flannery to the escort service) was a fake name and that "Matt" was the individual's real name.

Because investigators had previously focused upon individuals with names provided by, or similar to those provided by, the complaining witness and that those names now seemed to be of questionable accuracy, Evans and Flannery had confirmed that they were at the residence the night of the alleged attack, and that Evans and Flannery had made arrangements for the party including hiring and paying for the dancers, investigators began to turn their attention to these individuals and decided to conduct photo arrays on March 21, 2006 with Evans and Flannery as the potential suspects. One array contained a photo of Evans and one array contained a photo of Flannery. Consistent with Durham Police Department General Order 4077 Eyewitness Identification:

- Mangum was not shown the photo arrays in the presence of any other potential witnesses;
- The photo arrays were presented to Mangum by an independent administrator i.e. an officer who did not know which person in each of the photo arrays was considered the suspect in the array;
- Five fillers were used per suspect photo. Photos of Duke University lacrosse team members identified as persons other than Evans and Flannery were utilized;
- The fillers selected resembled the suspect in each of the arrays in significant features such as race, gender, facial features and weight. Again, using other team photos provided fillers that were similar in photographic composition and identical in individual dress;
- Different fillers were used in each of the two arrays;
- Photographs were presented sequentially;
- Mangum was given standard verbal instructions for each array which included advising her that the photograph of the person who committed the crime may or may not be included in the particular array.

Mangum did not identify her alleged attackers from the arrays presented to her that day.

On March 31, 2006, Investigator Himan and his immediate supervisor, Sgt. Mark Gottlieb, met with District Attorney Nifong to update him on the case. During the meeting, investigators inquired as to what, if any, use could be made of the new photographs that were taken as a result of the non-testimonial identification order. The District Attorney suggested showing Mangum all of the photographs in order to see if she could provide any additional information or details about the night in question. Investigators hoped that this would develop some leads, such as potential witnesses, for them since those initially developed in the case were becoming exhausted. In addition, investigators had been unable to determine whether Mangum was impaired on the night of her alleged attack and, if so, by what substance. Certain date rape drugs, such as Rohypnol and GHB, often result in amnesia of the victim but other substances, such as ecstasy and alcohol, typically do not. If the victim had some recollection of any of the individuals in the photographs, then this could help establish that she was not impaired by a memory altering substance which would then assist in gauging the reliability of Mangum's allegations.

On April 4, 2006, Sgt. Gottlieb, assisted by another officer and two crime scene investigators, showed Mangum the recently acquired team photographs. In the process of describing her recollection of persons and events at the party, she began identifying certain individuals as potentially her attackers. Officers did not intend, nor were they expecting, Mangum to positively identify her alleged attackers during this process, particularly since she had not done so in any of the earlier photo arrays which contained the individuals she had identified by name or which had been placed at the party and closely associated with its arrangements. Had it been the expectation of investigators that use of the photos in this manner would have resulted in Mangum identifying a suspect, officers would have believed that General Order 4077, "Eyewitness Identification" was applicable and would have acted in accordance with it. Faced with this turn of events, the investigator decided to note Mangum's comments and proceed to show her the remainder of the photographs. Abruptly stopping the observations after such comments could have been construed by the witness as confirmation that she had selected the "right" individuals and could arguably taint either these, or future, identifications.

Whether or not the results of the six photo arrays and the photo presentation on April 4th would have ever been admissible into evidence would have to have been argued and determined by a court of law. It is important to note that the policies of the Durham Police Department related to eyewitness identification procedures are, as with most policies, administrative guidelines for the officers. The eyewitness identification policy of the Durham Police Department in effect at the time of the above procedures had been revised and made effective by the agency on February 1, 2006. The policy was based upon recommendations by the North Carolina Actual Innocence Commission. They are not legally binding procedures. Any deviation from such guidelines does not necessarily mean that the eyewitness identification procedure used will be excluded from evidence or that a suspect's rights have been violated. In fact, when issuing recommendations for various types of eyewitness identification procedures, the NC Actual Innocence Commission expressly stated that the recommendations were "not intended to create, do not create, and may not be relied on to create, any rights, substantive or procedural, enforceable at law by any party in any matter civil or criminal." The legal standard that must be met for evidence of an out-of-court

identification procedure to be admissible in court is that the procedure must not be so unnecessarily suggestive that it creates a substantial risk of misidentification. A court will determine whether, under the totality of the circumstances, the identification was reliable. Case law is replete with examples of various types of eyewitness identification procedures that have not necessarily followed all of the Commission's recommendations yet have been found to be reliable so that they were allowed into evidence. A hearing on the admissibility of Mangum's identifications had been scheduled for February 5, 2006, but was postponed when the Attorney General's Office assumed responsibility for prosecution of the case. Obviously, the hearing became unnecessary once the criminal charges against the defendant were dismissed.

III. Sampling of Investigative Steps to Obtain Exculpatory Information

It is the standard practice of the Durham Police Department to not release criminal investigative files for a variety of reasons including, but not limited to, helping to ensure the integrity of cases at trial, protecting pending and future police investigative techniques, avoiding the disclosure of informants' identities, encouraging citizens to volunteer information regarding suspected criminal activity, and protecting the reputation of persons who may be investigated but are never charged. However, notes show that basic investigatory steps were followed to obtain information that might exonerate those ultimately charged, the department, pursuant to the request of the City's Administration, is providing the following examples of attempts made to obtain such information. This is not intended to, nor does it reflect, a detailed account of all such steps taken by the department.

- Investigators originally scheduled a meeting with all of the Duke University lacrosse team members on March 22, 2006. The meeting was cancelled and rescheduled for March 29th. The latter meeting was also cancelled and never rescheduled despite attempts by investigators.
- Investigators were told that an individual, not on the lacrosse team, may have attended the party but only that the individual's name was "Blake;" investigators searched an online social network and records management system and were thereby able to establish who they believed to be the individual; investigators set up an interview; the individual spoke with officers and indicated he had a written statement prepared, but wanted to speak to his attorney before providing it to the police; no statement was ever received.
- On April 13, 2006, investigators went to the campus of Duke University in an attempt to speak to witnesses and suspects prior to the indictments. One player, who was not at the party, spoke to investigators but was unable to provide any exculpatory information. Another player would only identify one individual as not being at the party (the individual named was not one of the persons ultimately indicted). Other players were not home, refused to speak with investigators, and one indicated that he had a prepared statement but would not give it to the police until he had spoken with his attorney. Investigators later spoke with the attorney who indicated that no statements would be provided.
- Prior to any indictments, investigators heard a rumor that a lacrosse player was working the night of the party at a particular bar. In an attempt to establish an alibi for any of the players, police contacted the bar which indicated that they would not provide any information until they spoke with their attorney. When the attorney did contact the police,

he indicated that no lacrosse players had worked that night and therefore, no alibis were established.

- As late as 10 p.m. the night before the initial grand jury proceeding, an investigator spoke with a defense attorney asking for exculpatory evidence which was never produced.
- Investigators set up and conducted interviews with the few witnesses who would speak with them such as Pittman, Mangum's driver, acquaintances and relatives of Mangum's, various officials of the University and the taxi driver who indicated that he had driven Seligman.
- Investigators followed up on a possible alibi that one of the indicted players was at a particular restaurant the night of the party. No alibi was established.
- Investigators obtained an order directing email records of the players to be preserved. It is our understanding that the District Attorney eventually determined that the cost of production of such documents would be prohibitive and therefore a court order for production was never obtained.
- Subpoenas were issued for the players' University key and access codes as well as home addresses. Investigators eventually received the addresses.

Investigators made consistent attempts and were always interested in obtaining exculpatory information. Claims that have been made to the contrary are simply unfounded. From the police department's perspective, the case note (Nov. 2, 2006) which may most concisely and accurately characterize the investigators' attempts to obtain and develop information states, in pertinent part:

I advised them (referring to two defense attorneys) that since the very beginning I have been trying to get cooperation and the truth from any one involved in this case. I stated I have not received that cooperation and that everyone is being represented by a lawyer, and not many people have been willing to talk to me. I advised them that I have not received any calls from the lacrosse players or willing to discuss anything about this case or the details of that night. [Name redacted for this report] stated that it was my job to find this information out. I advised him that if there is information that he knows about or has information of who I should speak to then I am willing and want to be notified. I advised him that many people do not want to be involved in this case, and probably are more willing to talk to you [name redacted] than me. I stated that I can only present evidence that is reported to me and that I discover. That I have never been called by any of the lawyers except for two, which were willing to give me information regarding this case [names redacted]. I advised them that they notified me and sent paper work of alibis but when asked to talk with these players about any information regarding that night, I was told that they didn't have any information. I stated that there has been a wall of silence and that I would look at all information that someone has to offer.